UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESCAP LIQUIDATING TRUST, Plaintiff, - against - SUMMIT FINANCIAL MORTGAGE LLC f/k/a SUMMIT FINANCIAL, LLC AND SUMMIT COMMUNITY BANK, INC. f/k/a SHENANDOAH VALLEY BANK, N.A. Defendant.	:	Case No. 1:14-cv-5453 (PGG)

REPLY MEMORANDUM OF LAW OF DEFENDANTS SUMMIT FINANCIAL MORTGAGE LLC AND SUMMIT COMMUNITY BANK, INC. IN FURTHER SUPPORT OF THEIR MOTION TO WITHDRAW THE REFERENCE

MURPHY & MCGONIGLE, P.C.
1185 Avenue of the Americas, 21st Fl.
New York, New York 10036
(212) 880-3976

Attorneys for Defendants

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PRELIMINARY STATEMENT

Subsequent to Summit's[1] filing of its initial papers in support of this motion to withdraw the reference, Judge Hellerstein issued the first (and so far only) decision on any of the eleven similar motions filed by mortgage originator defendants in the actions commenced by Plaintiff (or by Debtor RFC) that were or are pending in the Bankruptcy Court. In *Rescap Liquidating Trust v. RBC Mortgage Co.*, 14 Civ. 4457 (AKH) (S.D.N.Y. July 18, 2014), Judge Hellerstein granted the motion, finding that all of the *Orion* factors weighed in favor of withdrawal.[2] Judge Hellerstein specifically held that:

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[1] Unless otherwise noted, capitalized terms have the meaning ascribed to them in Summit's Opening Memorandum of Law in Support of this Motion ("Summit's Opening Mem.").

[2] *See* July 18, 2014 Order Granting Motion to Withdraw Reference and Transfer Venue ("RBC Order"), pp. 2-3. A copy of the RBC Order is annexed as Exhibit A to the Reply Declaration of Theodore R. Snyder, Esq., dated August 14, 2014 ("Snyder Reply Dec."), submitted herewith.

- RFC's breach of contract and indemnification claims were *non-core* because they (1) arise under state law, (2) do not depend on bankruptcy law for their existence and (3) could have been brought in a court other than the bankruptcy court;

- Because the claims are non-core and the Bankruptcy Court cannot issue final judgments and orders, adjudicating the case in the Bankruptcy Court would "impede[] efficiency and uniformity as the very same issues are reviewed a second time by a second court"; RBC Order, pp. 2-3; and

- Because the claims are state law claims, "there are no concerns about uniform administration of bankruptcy law." *Id.* p. 5.

In granting the motion, Judge Hellerstein rejected the *identical* legal and factual arguments Plaintiff proffers here in opposition to Summit's motion to withdraw the reference. This Court should follow Judge Hellerstein's reasoning in *RBC,* and grant Summit's motion.

ARGUMENT

I.

BECAUSE THERE IS NOT A CLOSE NEXUS BETWEEN THIS ACTION AND THE BANKRUPTCY, THE BANKRUPTCY COURT DOES NOT HAVE "RELATED TO" JURISDICTION

In its opposition to the motion ("Plaintiff's Opp."), Plaintiff relies solely on Judge Abrams' decision in *Residential Funding Company, LLC v. SunTrust Mortgage, Inc.*, 13-cv-8938 to support its contention that the stringent close nexus standard for post-confirmation bankruptcy jurisdiction is satisfied here. Plaintiff's reliance on the *SunTrust* decision is misplaced.

First, the motion in *SunTrust* was not to withdraw the reference. Rather, it was a motion to administratively refer the matter to the Bankruptcy Court pursuant to the District Court's Standing Order of Reference (No. 12 Misc. 32, January 31, 2012). In fact, the Court's Opinion expressly stated that it was not considering the *Orion* standards that govern motions to withdraw the reference and that SunTrust could advance those arguments after the case was referred to the Bankruptcy Court:

> [I]t would be premature for the Court to conduct an Orion analysis prior to such referral. *If SunTrust ultimately seeks to withdraw the reference, the Court may do so at that time.*

Memorandum Opinion and Order dated July 3, 2014 ("SunTrust Order"), pp. 5-6 (emphasis added). A copy of the SunTrust Order is annexed as Exhibit D to the Snyder Dec. dated July 18, 2014 ("Initial Snyder Dec.") submitted with Summit's opening moving papers. SunTrust accepted the court's invitation and filed a motion to withdraw the reference on August 1, 2014. *See Residential Funding Co. v. SunTrust Mortg., Inc.*, 14-cv-6015 (J. Ramos) – ECF No. 1.[3]

Second, the *SunTrust* court misapplied the close nexus standard. The court found a close nexus between the action and the bankruptcy because the claims against SunTrust "directly affect the 'implementation, consummation, execution or administration' of the Plan, as the Plan expressly preserves such claims, transfers them from RFC to the Liquidating Trust, and provides for RFC's creditors to receive a share of any recovery from them." SunTrust Order, pp. 4-5 (references to Plan, Confirmation Order and Plaintiff's Memorandum of Law omitted). But Plaintiff's claims against Summit do not involve the interpretation, implementation, consummation, execution or administration of the Plan, and the fact that the creditors would share in any recovery does not confer jurisdiction.

Moreover, the *SunTrust* court ignored the close nexus standard's requirement that resolution of the action as to which the reference is sought to be withdrawn must "affect[] an integral aspect of the bankruptcy process." *In re Metro-Goldwyn-Mayer Studios Inc.*, 459 B.R. 550, 556 (Bankr. S.D.N.Y. 2011). The issue in this action is whether loans sold by Summit to RFC breached representations or warranties Summit made to RFC in connection with the sale, and there is nothing about that issue requiring the interpretation of the Plan or any Order issued by the Bankruptcy Court. Plaintiff has not identified a single provision of the Plan that relates to, much less governs, the potential liability of mortgage originators like Summit for breach of representations and warranties, and, in fact, there are no such provisions.

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[3] For the same reason, Plaintiff's reliance on Judge Castel's decision in *Residential Funding Co., LLC v. GreenPoint Mortgage Funding, Inc.*, 13-cv-8937 for the proposition that the Bankruptcy Court has "related to" jurisdiction is also misplaced. At RFC's request, Judge Castel merely administratively referred the case to the Bankruptcy Court pursuant to the District Court's Standing Order of Reference without a formal motion, formal briefing or a hearing. *See* March 19, 2014 Memo Endorsed Order, a copy of which is annexed as Exhibit B to the Snyder Reply Dec. GreenPoint filed a motion to withdraw the reference on July 18, 2014, and a new docket number was assigned. *See Residential Funding Co., LLC v. GreenPoint Mortgage Funding, Inc.*, 14-cv-5452 (J. Castel). Thus, the only relevant decision is Judge Hellerstein's in *RBC*.

Nor is post-confirmation "related to" jurisdiction conferred simply because -- as the *SunTrust* court found -- "the Plan expressly preserves such claims, transfers them from RFC to the Liquidating Trust, and provides for RFC's creditors to receive a share of any recovery from them." SunTrust Order, pp. 4-5. If that were all it took to confer "related to" bankruptcy jurisdiction post-confirmation, the bankruptcy court's jurisdiction would actually expand rather than contract post-confirmation -- contrary to the more stringent standards of the close nexus test and contrary to governing caselaw. *See, e.g., In re General Media, Inc.*, 335 B.R. 66, 75 (Bankr. S.D.N.Y. 2005) ("A bankruptcy court cannot hear a post-confirmation dispute simply because it might conceivably increase the recovery to creditors, 'because the rationale could endlessly stretch a bankruptcy court's jurisdiction.'") (citation omitted). In short, Plaintiff's claims do not affect an integral aspect of the bankruptcy process.

II.

THE *ORION* FACTORS WEIGH HEAVILY IN FAVOR OF WITHDRAWAL

Even if the Bankruptcy Court had "related to" jurisdiction over this case (which it does not), this Court should nonetheless withdraw the reference to the Bankruptcy Court based upon the *Orion* standard.

A. This Action Is Non-Core And The Bankruptcy Court Does Not Have Authority To Enter A Final Adjudication

In its Opposition, Plaintiff reorders the *Orion* analysis by belatedly addressing *last* what all cases hold is the *first* and most important *Orion* factor -- whether the action is core or non-core and whether the bankruptcy court has authority to enter a final adjudication. Plaintiff's Opp., Point IF.[4] Plaintiff demotes the core/non-core factor to last because it cannot possibly demonstrate that the purely state law breach of contract and indemnification claims it asserts here and in approximately 70 cases in state and federal courts -- *i.e.*, in *non*-bankruptcy courts -- are core, or that the Bankruptcy Court has authority to enter a final adjudication. *See In re Joseph DelGreco & Co., Inc.*, No. 10 CV 6422 (NRB), 2011 WL 350281, at *2 (S.D.N.Y. Jan. 26, 2011) ("By contrast, '[a]n action that does not depend on the bankruptcy laws for its existence and which could proceed in a court that lacks federal jurisdiction is non-core.'"); *Interconnect Tel. Servs., Inc. v. Farren*, 59 B.R. 397, 400 (S.D.N.Y. 1986) ("Non-core proceedings consist of those 'claims arising under traditional state law which must be determined by state law.' They are 'those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or state court.'") (citations omitted); *see also* Summit's Opening Mem., Points IA and IIA.

Nevertheless, Plaintiff alleges that the action is core because resolution of the action will require application and enforcement of the Plan, the Confirmation Order and the Orders approving the RMBS Settlements. Plaintiff's Opp., p. 16.[5] The contention is specious;

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[4] "A district court considering whether to withdraw the reference should *first* evaluate whether the claim is core or non-core, since it is upon this issue that questions of efficiency and uniformity will turn." *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2d Cir. 1993) (emphasis added), *cert. dis.*, 511 U.S. 1026 (1994).

[5] This argument appears to be limited to only one of the claims asserted -- the indemnification claim -- as Plaintiff does not assert that any Bankruptcy Court Orders need to be interpreted or

questions about Summit's potential liability to Plaintiff will turn on the language and interpretation of the specific agreements pursuant to which Summit sold loans to Plaintiff that contain the representations and warranties, not on the language and interpretation of the Plan or any of the Bankruptcy Court's Orders.

The Plan provisions Plaintiff cites (IV.C.3, IV.D, IV.E and IV.H)[6] provide details of the settlement between the Debtors and the various RMBS claimants that asserted claims *against* the Debtors -- *i.e.*, the securitization trust trustees, the monoline insurers and the investors asserting violations of the securities laws. Those provisions address the amount of the claims that will be allowed to RMBS claimants, how the allowed claims will be allocated among the Debtors, and how distributions will be allocated among the RMBS claimants. The provisions have nothing to do with the breach of representation and warranty claims asserted against mortgage originators like Summit. Nor are there any provisions in the rest of the Plan, the Confirmation Order or in any of the Orders approving the RMBS Settlements that would need to be applied, much less enforced, to adjudicate Plaintiff's indemnification claim against Summit. Tellingly, Plaintiff does not cite to a single provision in the Plan or any Order purporting to govern the potential liability of mortgage originators to RFC.[7]

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enforced to adjudicate the breach of contract claim (or the guaranty claim against Summit Community).

[6] *See* Plaintiff's Opp., p. 18.

[7] Plaintiff cites *In re Gen. Growth Props., Inc.* 460 B.R. 592, 598 (Bankr. S.D.N.Y. 2011) in support of its contention that a bankruptcy court has core jurisdiction to interpret and enforce its own orders, but the case is of no assistance. There, the noteholders' indenture trustee held up distributing $15 million received under the plan to the noteholders because the indenture trustee's financial advisor demanded a fee the trustee believed to be excessive under the language of the plan. Under such circumstances, the bankruptcy court's interpretation of the plan -- specifically, the provision governing fee payments -- was critical. Plaintiff also mistakenly relies on *In re Charter Communications*, No. 09-14435 (JMP), 2010 WL 502764 (Bankr. S.D.N.Y. Feb. 8, 2010), where there was a challenge to the scope of third-party releases

At the end of the day, no matter how hard Plaintiff tries, it cannot evade the unanimous caselaw holding that indemnification claims are *not* core. As Judge Hellerstein held in *RBC*:

> Courts in this circuit have repeatedly found that when a debtor brings an adversary proceeding seeking indemnification pursuant to a pre-petition contract, those claims are non-core.

RBC Order, Exhibit A, p. 4 (citations omitted). *See also In re J.T. Moran Fin. Corp.*, 124 B.R. 926, 930 (Bankr. S.D.N.Y. 1991) ("The debtor's state-law cause for indemnification is not a core matter because it does not invoke substantive rights provided by title 11 and is not central to the bankruptcy court's function in administering the estate of the debtor.")

B. Judicial Economy Favors Withdrawal Because The Bankruptcy Court Has Virtually No Familiarity With This Action

Unable to demonstrate that this action is core, Plaintiff essentially puts all its eggs in the "judicial economy/familiarity" basket. Unfortunately for Plaintiff, while the Bankruptcy Court may have familiarity with the RMBS Settlements it approved, there is no indication it has *any* familiarity with the facts and law relevant to *this* action, which is the critical "familiarity" required in the *Orion* analysis. *See, e.g., Dynegy Danskammer, L.L.C. v. Peabody COALTRADE Intl. Ltd.*, 905 F. Supp. 2d 526, 533 (S.D.N.Y. 2012) (rejecting plaintiff's defense to motion to withdraw reference based on bankruptcy court's alleged familiarity with the issues because "the bankruptcy court likely does not have extensive familiarity *with the record related to the Complaint*") (emphasis added).

Plaintiff does not -- indeed, cannot -- contend that Judge Glenn has any familiarity with, or that he has even looked at, any of the loans Summit sold to Plaintiff or the agreements between Summit and Plaintiff. To our knowledge, Judge Glenn has not tried any RFC cases

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in the plan and the bankruptcy court was compelled to interpret the scope of the plan's releases so that it could rule on the challenge. Here, by contrast, there is no plan provision being challenged or requiring interpretation.

involving loan originators like Summit, and in approving the RMBS Settlements, he did not review a single loan originated by Summit or consider any possible breaches of representations and warranties on the part of Summit.[8] Nor has Judge Glenn ruled on any motions to dismiss brought by mortgage originators involving the legal defenses -- statute of limitations and/or lack of standing -- Summit intends to assert in this action.

In sum, Plaintiff has vastly overstated the Bankruptcy Court's "familiarity" with the issues relevant to this action, and there is no efficiency or judicial economy to be gained by maintaining this action in the Bankruptcy Court. *See Residential Funding Company, LLC v. Cherry Creek Mortg. Co., Inc.*, Civil No. 13-3449 (JNE/SER), 2014 WL 168516, at *5 (D. Minn. April 29, 2014) ("The Court is not persuaded that the familiarity with Residential Funding acquired by the bankruptcy court is such that transfer of this action to the Southern District of New York is appropriate.");[9] *see also M. Fabrikant & Sons Inc. v. Long's Jewelers Ltd.*, No. 08-CV-1982, 2008 WL 2596322, at *4 (S.D.N.Y. June 26, 2008) (rejecting debtor's judicial economy argument because "[w]hile Judge Bernstein has familiarity with Fabrikant's estate, the dispute in this case [is] discrete, involving a non-core contract claim.").[10]

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[8] Rather than conducting a loan-level review, RFC's expert report that formed the basis of the RMBS Settlements approximated damages by using market data not specific to any originator. The expert based his conclusions on industry-wide trends with little information specific to RFC and the loan pools it securitized. *See In re Residential Capital, LLC*, No. 12-12020 (MG), ECF No. 1712 (Bankr. S.D.N.Y. October 3, 2012).

[9] A copy of the *Cherry Creek* decision is annexed as Exhibit C to the Initial Snyder Dec.

[10] Plaintiff cites a number of cases in which a district court decided not to withdraw the reference in a non-core matter because of the bankruptcy court's extensive familiarity with the critical issues in the adversary proceeding. *See* Plaintiff's Opp., pp. 10-11. It is simply not the case here, however, that the Bankruptcy Court has extensive familiarity with the factual and legal issues critical to this action. For example, Plaintiff cites *In re Connie's Trading Corp.*, No. 14 Civ. 376 (LAK) (GWG), 2014 WL 1813751 (S.D.N.Y. May 8, 2014), but there the bankruptcy court had presided over the adversary proceeding for two years during which time it had developed a high level of familiarity with the issues. Plaintiff also cites *In re Lyondell Chem.*

C. The Other *Orion* Factors Also Favor Withdrawing The Reference

1. Undue Costs and Delays - Because discovery is only beginning in this action, withdrawing the reference at this very early stage of the proceedings would not result in any undue cost or delay to the parties. *See LightSquared Inc. v. Deere & Co.*, No. 13 Civ. 8157 (RMB), 2014 WL 345270, at *6 (S.D.N.Y. Jan. 31, 2014).[11] However, because the Bankruptcy Court will not be able to render a final judgment and, of necessity, there will be a second layer of litigation at the District Court level, maintaining the reference to the Bankruptcy Court will actually result in delay and increase the parties' costs.

2. Uniformity of Bankruptcy Administration – Plaintiff alleges that maintaining this action in the Bankruptcy Court will promote uniformity of bankruptcy administration because there are common factual and legal issues, *see* Plaintiff's Opp., p. 14, but that is not the applicable standard. The law is clear that whether a bankruptcy court's adjudication of a claim would promote uniformity of bankruptcy administration is solely a function of the nature of the claim -- not whether there are common factual and legal issues among multiple actions. Courts routinely have found no such benefit where, as here, the claims are based on state law and do not raise substantive issues of bankruptcy law. *Dynegy*, 905 F. Supp. 2d at 533; *Joseph DelGreco*,

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Co., 467 B.R. 712 (S.D.N.Y. 2012), but there the bankruptcy court had presided over the adversary proceeding for more than a year, discovery was closed and the court was in the midst of working on six motions to dismiss. By contrast, discovery has only just begun, and, as Plaintiff acknowledges, the Bankruptcy Court has not issued substantive rulings in any of Plaintiff's actions. Plaintiff's Opp., p. 15.

[11] Plaintiff argues that it would promote efficiency and save costs if the 14 cases pending in the Bankruptcy Court remained there so that one judge could supervise coordinated discovery. Plaintiff's Opp., Point IC. Given that there are approximately 67 other actions pending in the District Court in Minnesota before multiple judges -- solely because Plaintiff chose to commence those voluminous separate proceedings -- it is a bit late for Plaintiff to feign concern for judicial economy.

2011 WL 350281, at *5. That is particularly the case inasmuch as while there are 14 cases in this District, there are approximately 67 pending in Minnesota.

3. **Forum shopping** – While Plaintiff characterizes as "outlandish," (*see* Plaintiff's Opp., p. 15), the notion that it could be guilty of forum shopping, its course of conduct in filing approximately 70 separate cases with similar claims in various other courts, mostly in Minnesota where it was headquartered, and then attempting to move every one of those cases to the Bankruptcy Court speaks for itself.

CONCLUSION

For the reasons set forth above and in Summit's Opening Mem, Summit respectfully requests that this Court follow Judge Hellerstein's decision in *Rescap Liquidating Trust v. RBC Mortgage Co.*, 14 Civ. 4457 (AKH), and withdraw the reference of this action to the Bankruptcy Court.

Dated: August 14, 2014
New York, New York

MURPHY & MCGONIGLE, P.C.

By: ______________________
James Murphy, Esq.
jmurphy@mmlawus.com
Theodore R. Snyder
tsnyder@mmlawus.com
Barry S. Gold
bgold@mmlawus.com
1185 Avenue of the Americas, 21st Fl.
New York, New York 10036
(212) 880-3976

Cameron S. Matheson
cmatheson@mmlawus.com
4870 Sadler Road, Suite 301
Glen Allen, Virginia 23060
(804) 762-5230

Attorneys for Defendants